

***FOR THE DEPARTMENT OF JUSTICE – A BACKGROUND ON THE REAL ESTATE
INDUSTRY'S SUPPRESSION OF EXCLUSIVE BUYER AGENCY***

November 19, 2005

Exclusive Buyer Agency has long been recognized by consumer advocates as a preferred agency choice for real estate buyers. As recently as the May, 2005 issue of Consumer Reports, in an article entitled **"Your Home - Buying, Owning, Selling - How to Protect Your Biggest Investment"**, EBAs were recognized as the "true" and "genuine" buyer's agents. EBAs are dedicated to finding their clients the right home at the best price and on the best terms possible – providing unbiased home showing (since they do not list property for sale), no conflicts of interest such as "dual agency," and a wider selection of properties for the buyer to see (including for-sale-by-owner properties that regular agents may not show). However, despite the obvious advantages of utilizing an EBA when making a real estate purchase, exclusive buyer agency remains a well kept secret within the real estate industry. This is due in large part to the industry's systematic suppression of exclusive buyer agency as an agency option available to consumers. Traditional brokerages have huge clout with State Real Estate Associations – and the Associations do not make consumers aware that there is a pure-representation option for the buyer in the form of agency-level representation called "Exclusive Buyer Agency."

From its coordinated "minimum service legislation" response to the emergence of discount listing brokers, it is dramatically evident that the real estate industry will take great pains to protect itself from any perceived competitive threats. Exclusive Buyer Agency is perceived by organized real

estate as a threat to the status quo as it challenges the sanctity of one of the holy grails of the industry--the in house transaction known within the industry as a “double dip”--where a brokerage represents both the buyer and the seller in the same transaction, thereby doubling commission revenues.

Relocation Advisors Group Inc. believes that much of what is occurring in the real estate industry today is tantamount to legalized insider trading. As a result, organized real estate has suppressed the growth of exclusive buyer agency, and thereby inhibited free and fair competition among buyer's brokers, by means of the following: (1) the failure to acknowledge Exclusive Buyer Agency as an agency choice worthy of consumer disclosure (2) the legalization of Dual Agency (where a broker “represents” both the buyer and the seller in the same transaction) by means of “Designated Agency” legislation which has now been pushed through in over half of the states; (3) the subjection of buyer brokers to the antiquated sales doctrine of “Procuring Cause”; and (4) discriminatory treatment of Exclusive Buyer Agents by the National Association of Realtors® and its affiliates.

Failure to Acknowledge Exclusive Buyer Agency as an Agency Choice

Subject to Consumer Disclosure

The growth of buyer agency has been due in large part to the watershed study completed by the Federal Trade Commission in 1983, in which 71% of buyers surveyed thought that the “subagent/seller's agent” showing them a property was actually “their” agent. As a result of the FTC's involvement, agency disclosure to consumers came into being. Unfortunately, compliance with state mandated agency disclosure has been abysmal. Compliance has been so problematic that a number of states no longer even require agency disclosure at first substantive contact, and now only require agency disclosure “as soon as practicable but no later than the writing of an

offer.”

Relocation Advisors Group Inc's question is, “Practicable for whom?” This is just another instance of the real estate industry responding to widespread noncompliance with the laws by changing the laws themselves, thereby legalizing previously unlawful behavior. What a concept!

Disclosure of agency relationships will disappear in the State of Florida next year; they have apparently decided it's just not needed. By the time agency disclosure is made (if ever, as evidenced by a sting operation conducted by the Massachusetts Attorney General), buyers have in many instances already provided confidential information to an agent who is duty bound to use that information to the seller's advantage.

When State mandated agency disclosure is provided, consumers have no idea that Exclusive Buyer Agency is even an option. Despite the fact that the National Association of Realtors® (NAR) defined Exclusive Buyer Agency in 1993 in its Agent's Guide entitled "Agency: Choices, Challenges & Opportunities", not a single State requires disclosure of Exclusive Buyer Agency as an agency option.

Currently – **state consumer disclosure brochures are not offering adequate consumer disclosure and protection.** Home buyers are being discriminated against – by the extensive influence the National Association of Realtors and State Realtor organizations - which keeps the mention “exclusive buyer agency” from consumers – as one of their Real Estate options.

Consumers only hear about Exclusive Buyer Agency from either a true Exclusive Buyer Agent, or from books and magazines. Disclosure brochures in very state other than Ohio do not mention the option at all.

The “options” that are mentioned (that don't include exclusive seller agency or exclusive buyer agency) invite dual/designated agency, an anti-consumer and self-serving business model if there ever was one. Dual agency is all about money and market control, and not serving the best interests of the consumer.

The National Association of Realtors (NAR) has taken the position that rather than being an agency option, the practice of Exclusive Buyer Agency is merely a “business practice”, which should not be promoted to the exclusion of any other business practice or business model. Yet NAR does, however, promote business practices which protect the entrenched position of the bulk of its membership, such as Dual Agency and Designated Agency, which while lucrative for its Realtor® membership, have the potential to be harmful to consumers.

Dual agency and designated agency are both business models in the most self-serving way. Certainly not a form of representation under true agency, unless they mean 'represent the best interests of the agency & agents, and “to heck with the consumer.” Dual & designated agency exist only to perpetuate and control the traditional brokerage model of having both sides of the transaction so the listing company can collect both sides of the commission.

This would be quite an egregious breach if this occurred in a true exclusive agency with full fiduciary duties by putting the needs (financial) of the agency before the needs of the client.

Relocation Advisors Group Inc. believes that the double standards should end now, and that Exclusive Buyer Agency, which can oftentimes be a buyer's best agency option, should be disclosed to all consumers. The state legislatures, which are dominated by industry interests, have utterly failed to protect consumers by mandating meaningful disclosure of agency relationships.

RECOMMENDATION:

Relocation Advisors Group Inc. would urge NAR to consider a minimum uniform agency disclosure standard including Exclusive Buyer Agency as an agency option. If NAR will not do so voluntarily we would urge the Federal Trade Commission to consider this issue as a very high priority.

The federal government could require that each state revise their mandatory disclosure brochures to disclose ALL types of agency representation available to consumers – including the option of “Exclusive Buyer Agency” as well as the IMPLICATIONS (in detail – with examples) of each form of agency representation. There are many disclosure gaps that exist today in the real estate industry – and this is by far, the largest one.

Or - the Federal government could require all real estate agents provide a disclosure of agency relationship form. This form should include exclusive buyer brokerage, exclusive seller brokerage and all forms of Dual agency relationships including co-broker options and state specific forms of representation. This disclosure should be provided during their first meeting between the customer and the agent – before the customer becomes their client.

Relocation Advisors Group Inc. feels that a meaningful minimum standard for the disclosure of agency relationships in the industry will protect consumers in a much better way versus what currently exists today.

EXCLUSIVE BUYER AGENCY IS A DISTINCT FORM OF “AGENCY REPRESENTATION”

Exclusive buyer agency is a very distinctive form of representation where the agent never represents sellers (neither they nor their brokerage lists property for sale) – and always represents buyers – offering the purest form of representation in Real Estate for buyers – with more fiduciary responsibilities than a “buyers agent” – and having unbiased home showing, showing of all FSBO properties, and more. The “business model” (as they call it) of Exclusive Buyer Agency – is a threat to the traditional Real Estate industry, where agents represent both sides of the transaction – which can include “buyers agents” when their own buyer likes a property that they have listed.

Exclusive Buyer Agency is the quintessential agency option. It pertains directly to the six legally binding fiduciary duties owed to a principal. It is not a “business model” – but rather a distinct form of representation.

True [exclusive] agencies have to sacrifice representing one side of the transaction at all times so the consumer receives 100% representation at all times on the other side. Because it is a very rare form of representation nowadays – this form of representation has little to no voice, and no political clout with the State and National organizations – who would rather see this form of representation disappear altogether.

MANY STATE REALTOR ASSOCIATIONS CLAIM THAT “EXCLUSIVE BUYER AGENCY” FALLS UNDER THEIR DISCLOSURE OF “BUYER AGENCY” AND IS JUST A “BUSINESS MODEL” THAT SHOULD NOT BE PROMOTED BY THE STATE

The States claim that because the disclosure “Buyer Agency” as a consumer option to the consumer – that that is all they need to do. They claim that Exclusive Buyer Agency would fall under buyer agency. Nothing could be further from the truth. The argument by the State Realtor Associations is that “exclusive buyer agency” is a “business model” and not a form of representation. We couldn't disagree more.

This state-sanctioned, non-disclosure of Exclusive Buyer Agency as a consumer option is a form of discrimination, and fosters restraint of trade.

Exclusive Buyer Agency is an option that all consumers are entitled to understand and choose if they so desire. The federal government should mandate that each State Realtor Association make a clear distinction between the conflicts of interest (not only dual agency – but being in an office where conversations are overheard / shared fax machines etc.), possible biased home showing, and other disadvantages associated with a consumer using a “buyer's agent” versus the form of representation called “Exclusive Buyer Agency.”

OUR COMMENT:

If they are calling “Exclusive Buyer Agency” a business model – then surely “Dual Agency” and “Designated Agency” are both “business models” as well. Or – they are all forms of representation. In either case – why is “dual agency” and “designated agency” mandated to be disclosed when “exclusive buyer agency” is not? One could tongue-in-cheek say because “exclusive buyer agency” is not an inferior form of representation for the consumer – and therefore, the consumer doesn't need to be protected from this form of representation. The states only need to mention the forms of representation that harm the consumer. Unfortunately – this positive form of representation is never mentioned to the consumer as an option - in reality - because the lobbying forces (and influence peddlers) want to continue the lucrative status quo for brokerages “doing both sides of the transaction.”

To claim that exclusive buyer agency is a 'business model' and not a form of representation shows how desperately they are trying to get out of more agency duties to the consumer, altogether.

We believe that the National Association of Realtors (NAR) and the State Association of Realtors in all 50 States do not have the right to dictate which models the consumer gets to know about – which effectively limits their known choices to brokerages that represent both sides of the transaction.

The consumer should have the right to choose the model that best fits his or her needs, including the right to choose Exclusive Buyer Agency!

STATE DISCLOSURE FORMS:

The state mandatory disclosure forms are gobbledygook gibberish – and do not disclose **the true implications** of the various forms of representation to the home buyer. (Of course – exclusive buyer agency representation is not mentioned at all.)

Overview - http://homebuying.about.com/cs/disclosures/l/bl_disclosures.htm

MANY STATE AND LOCAL REALTOR ASSOCIATIONS ARE CO-OPTING THE TERM "EXCLUSIVE BUYER AGENCY" TO NEUTRALIZE THE MEANING OF THE TERM (AND THIS FORM OF REPRESENTATION) – IN ORDER TO CONFUSE THE GENERAL PUBLIC

State and Local Realtor organizations are attempting to prostitute the meaning of "exclusive buyer agency" – now calling forms previously called "buyer agency agreements" – "exclusive buyer agency agreements." What the form really means is "exclusive right to represent" – which is what it was called before (or just a "buyer agency agreement") Consumers are being misled by brokerages who claim to represent buyers, exclusively, when all the consumer has signed is in reality – an Exclusive Right to Represent Agreement.

NON-DISCLOSURE BY TRADITIONAL BROKERAGES

Many large brokerages practice dual agency and all of them do not disclose the existence of the form of representation called Exclusive Buyer Agency."

ARIZONA:

Arizona's "Real Estate Agency Disclosure and Election" form is supposed to be signed by the Agent and Client, presented at the first meeting, before any property showing begins. However - few, if any agents/brokers, really follow the R.E. Commissioner's rule according to inputs from agents in Arizona.

The disclosure describes the DUTIES of the Real Estate Agent:
I) "The Buyer's Broker" - II) "The Seller's Broker" - III) "Broker Representing both Seller and Buyer (Limited Dual Representation)", and then has a section for "Election" by Client/Customer.

This section has two elections: Buyer's Election, where Buyer checks box to either be represented as Buyer by "Buyer's Broker", or Seller as Seller's Broker, or show Broker's listed property with Buyer agreeing to DUAL Agency.....

Buyer and Seller, if elected DUAL are supposed to sign separate written agreement, other than the Purchase Contract.

COLORADO:

Colorado is one of the designated broker states. All Colorado licensees are brokers and can choose to offer agency (buyer or seller) or non-agency (transactional broker) relationship business models. The Dual Agency business model is illegal in Colorado.

The exclusive buyer agency business model is not a part of the state and commission required brokerage relationships disclosure in Colorado.

Unfortunately, there is a provision for and a Change of Brokerage Relationship form is provided in circumstances that arise after the initial agency agreement is signed where the broker can defer to transactional brokerage (dual agency is illegal) to facilitate collecting commissions from both sides of the transaction. This occurs "after the fact" and results in co-mingling relationships between agency and non-agency when showing multiple properties, i.e., showing other broker listings and showing broker listings. It harms both the seller and buyer as neither is "represented." Transactional brokerage an open door for practicing implied (dual) agency and calling it transactional brokerage.

ILLINOIS:

There is a new disclosure brochure put out by the Illinois Association of Realtors which discloses all types of agency representation except "Exclusive Buyer Agency." They claim that "Exclusive Buyer Agency" is a "business model" and falls under the "Buyer Agency" disclosure. Never mind that a "Buyer's Agent" can get into a "Dual Agency" situation – whereas an Exclusive Buyer Agent cannot. Never mind that the "Buyer's Agent" may have home showing biases by showing more of their own company's listings to their client (because they get a higher commission split in some cases.) Never mind that the "Buyer's Agent" may not even have the buyer under a written contract outlining their responsibilities to the client (which are much less than an Exclusive Buyer Agent), and may not show them For Sale By Owner properties – like an Exclusive Buyer Agent does.

The State is attempting to Co-opt the meaning of the term Exclusive Buyer Agency – by re-naming the buyer agency contract an "exclusive buyer agency" contract – which is really just an "exclusive right to represent."

OHIO:

ONLY ONE STATE'S REALTOR ASSOCIATION – OHIO, DISCLOSES THE EXISTENCE OF EXCLUSIVE BUYER AGENCY

There is only one state REALTOR Association, the OAR, or Ohio Association of Realtors currently recognizing the existence of the option of exclusive buyer agency – the Ohio Association of REALTORS. They require full disclosure of services provided by brokerages in Ohio – in the brokerage's "Consumer Guide to Agency Relationships" -- which includes the mention of Exclusive Buyer Agency (but unfortunately - only if that brokerage practices Exclusive Buyer Agency only.) Ohio also recognizes Dual Agency and Split Agency and Exclusive Seller Agency.

More needs to be done however – to include disclosing the potential implications of each form of agency representation in Ohio – perhaps though the OAR's "Agency Compliance Manual." Though the State of Ohio mentions Exclusive Buyer Agency - brokerages in Ohio are not required to disclose the existence of Exclusive Buyer Agency to their clients

unless that brokerage is Exclusive Buyer Agency only. Ohio real estate buyers still don't know that "Exclusive Buyer Agency" even exists as an option for them because only Exclusive Buyer Agents are required to disclose this! (Hit "Ctrl" and click to open the following links)

[Ohio's Two Page "Agency Disclosure Statement."](#)

[The 90 page OAR "2005 Agency Compliance Manual." \(HTML format\)](#)

[Ohio's Agency Compliance Manual in PDF format](#)

<http://www.com.state.oh.us/real/ModelConsumerGuides-AgencyDisclosure.aspx>

It shows how complicated a government agency can make things.

Then you have the specific property disclosure statement:

http://www.com.state.oh.us/real/documents/2005-01-01_Agency_Disclosure_Form_000.pdf

MINNESOTA:

In the State of Minnesota disclosure form - the term "principal" never shows up in printed text anywhere on the 1800 word document. This is no accident. The term "principal" pertains precisely to "agency" and agency points conspicuously to EBA. Designing an 1800 word form about agency and NEVER introducing the fundamental term "principal" is like writing an 1800 word documentary on parenting and never mentioning the word child.

MISSOURI

The Missouri broker disclosure form is SUPPOSED to be presented upon first contact and BEFORE any financial information is given, however not all agents do this or know that. The form purports to give the consumer a choice to choose the type of agent they want to work with. The form says that "you may also want to consider an exclusive type of relationship" however it doesn't include the alternative of exclusive buyer agency on the form. Here is the statute:

Broker disclosure form for residential real estate transaction, provided by licensee, prior agreement, effect.

R.S.MO 339.770. 1. In a residential real estate transaction, at the earliest practicable opportunity during or following the first substantial contact by the designated broker or the affiliated licensees with a seller, landlord, buyer, or tenant who has not entered into a written agreement for services as described in subdivision (5) of section 339.710, the

licensee shall provide that person with a written copy of the current broker disclosure form which has been prescribed by the commission.

2. When a seller, landlord, buyer, or tenant has already entered into a written agreement for services with a designated broker, no other licensee shall be required to make the disclosures required by this section.

3. Disclosures made in accordance with sections 339.710 to 339.860 shall be sufficient as a matter of law to disclose brokerage relationships to the public.

NEW YORK STATE:

Designated Agency is allowed in New York and is being pushed here as a way to make more money for the agent. When the co-op fee is low, if you are working for the buyer, the agent can get the buyer to make up the difference between the co-op and what the agent wants to get. But, designated Agency is not even disclosed or discussed on the Agency Disclosure Form. Dual Agency is not called "Dual Agency" on New York's State Disclosure Form. They term it as 'Agent Representing Both Buyer and Seller.'

There is no 'full disclosure' by the State Association in their "consumer disclosure forms" so that the consumer can have 'informed consent'. The form only gives limited disclosure, without the pitfalls of dual agency, so that the consumer will give their consent (though not informed).

New York requires the disclosure form to be presented to the consumer "at first substantive contact". That is defined as before any confidential information may be exchanged.

NORTH CAROLINA:

There is a mandatory disclosure brochure which discloses all types of agency representation EXCEPT "Exclusive Buyer Agency"

TENNESSEE:

IN Tennessee, Exclusive Buyer Agencies or Exclusive Seller Agencies are not listed in the state mandated disclosure. There is no mention of Exclusive Buyer Agencies anywhere in anything coming from the state or the state association of Realtors. Apparently - in their eyes such a practice has nothing to offer the consumer.

Legalization of Dual Agency by Passage of "Designated Agency" Legislation

Under the common law of agency, a real estate brokerage acts as the agent for its principal, and is duty bound to fulfill fiduciary obligations of **loyalty, confidentiality, obedience, reasonable care, accounting and disclosure** to its clients. It is impossible for a broker to provide the full range of fiduciary obligations in a dual agency situation,

where the brokerage represents both the buyer and the seller in the same transaction. Due to the demand for buyer representation and the legal pitfalls associated with Dual Agency, the real estate industry has devised a statutory creation called “Designated Agency” which allows a brokerage to represent both buyers and sellers in the same transaction, in derogation of the common law of agency. Designated Agency legislation is recommended by NAR, written by its state associations, and pushed through with the help of Realtor® PAC dollars. Through Designated Agency, a brokerage can legally “represent” both parties in the same transaction, and thereby keep the entire commission for itself. Designated Agency is a wolf in sheep’s closing.

Relocation Advisors Group Inc. is adamantly opposed to Designated Agency, which we believe to be nothing more than undisclosed Dual Agency. The real estate industry is steering consumers toward potentially harmful representation schemes such as Designated Agency to the detriment of EBAs, who provide true buyer representation. Both Dual Agency and Designated Agency are business practices being used by listing brokers, who control the industry, to collect commissions on both sides of a transaction.

EBAs, though mostly Realtors®, have been deliberately excluded from any meaningful policy making discussions within NAR with respect to buyer agency issues. Through its state associations, NAR has effectively prevented Exclusive Buyer Agency from being presented to consumers as an agency option on state mandated real estate agency disclosure forms. Its wholly-owned subsidiary, the Real Estate Buyer’s Agent Council, Inc. (REBAC), which until recently recognized Exclusive Buyer Agency as an agency choice, now refuses to make any distinction between EBAs and ordinary agents who work for brokers who represent both buyers and sellers. EBAs are not recognized on NAR’s official website, Realtor.com. Many state Realtor® associations have adopted buyer agency agreements with confusing names such as “Exclusive Buyer Agency

Agreement” - prostituting the meaning of “Exclusive Buyer Agency”, when in actuality such agreements have nothing to do with Exclusive Buyer Agency as defined by NAR – and are really just “Exclusive Right to Represent” contracts – with the agents working for brokerages that list properties for sale. The real reason for such contracts is to tie the Buyer to a brokerage which then maintains the right to act as a Dual or Designated Agent.

NAR has taken the position that real estate listings are the property of the listing agent, and that EBAs, who may be both Realtors® and members of a multiple listing service, but who have no listings, must depend on permission from listing brokers to display MLS information over the internet. NAR's most recent proposed guidelines concerning MLS participation imply that a firm must both offer and accept compensation to be eligible to participate. EBA's do not list properties for sale, have no listings in the MLS, and therefore never offer compensation. Many EBAs look to their own clients for compensation rather than accepting compensation from listing Brokers. Is NAR now attempting to exclude EBAs from MLS participation?

Consumers are being systematically deprived of the very real choice of Exclusive Buyer Agency, a consumer friendly agency option which should be available to all home buyers. In an effort to fulfill their obligation to protect the consumers in this country the Department of Justice and the Federal Trade Commission may need to take the action to encourage the states to disclosure “Exclusive Buyer Agency” as a consumer option.